insurance law in Latin America

DAVIES ARNOLD COOPER

Contents

Foreword

It is just over a year since the first edition of this Guide was produced, and it is satisfying to see that interest in the continent, its insurance industry and law has carried us through the original print run and into a second.

In the intervening period, Davies Arnold Cooper's commitment to the region has continued unabated, and we have had the pleasure of a secondment from our Mexican contributor, Francisco Fernadez Guerra-Fletes, to both our London and Madrid offices. We expect to be announcing details soon of our strengthened representation in Latin America.

The statement of the law remains a snapshot at May 2002, although some changes have been made, in particular to the Mexican content. We hope that you will find it a useful starting point, and will be more than pleased to examine in greater depth with you substantive questions of law and practice.

Kenneth McKenzie
June 2003

Davies Arnold Cooper is one of the foremost insurance and reinsurance practices in the UK, with proven expertise built upon over seventy years of serving the Lloyd's, London and international insurance and reinsurance markets.

Our clients include a range of national and multi-national insurers, underwriters, intermediaries, brokers and service professionals, and the major entities they insure.

We advise across the spectrum of insurance work, from relatively low value high volume schemes, delivering a standard product at a competitive price, to multi-billion pound disputes involving teams picked from across the practice to engineer a bespoke service for a particular matter. We cover casualty, EL/PL, property, motor, professional indemnity, financial, political and corporate risk, regulatory, contingency, film finance, oil and gas, energy and construction, environmental risk and more, from fully subrogated representation, to coverage advice and non-contentious regulatory, drafting and advisory services.

Our reach is international, through our carefully cultivated worldwide network of correspondents on every continent. In addition to extensive experience in the US, we are currently engaged in matters as far afield as the Caribbean, Africa, the Pacific Rim and Scandinavia, and to a major extent Latin America.

Our Madrid office, established eleven years ago, is ranked by Expansion and Legal Business as the No. 1 Insurance practice in Spain. It is staffed by Spanish lawyers, fluent in English and fully conversant with the customs and expectations of the London market. Most Latin American legal systems are, like Spain, code based. The DAC Spanish and Latin American Unit, a virtual representation of the cross office skills, is able through Spanish and English lawyers in Madrid and London, to offer a unique service

to those doing business in Latin America, in tandem with our correspondents there. We aim to provide a combination of language skills, proven experience, legal knowledge and thorough understanding of the market's requirements, together with the breadth and depth to cope with any demand, however challenging. It was natural, therefore, that we should both anticipate and respond to the market's need for fully resourced legal service to draw together the skills of our Spanish colleagues with those of our correspondent firms in Latin America. Our goal is not only to render clear and practical legal advice to those needing it throughout the jurisdictions tackled in this short guide, but to bridge the conceptual, cultural and legal gaps for all our clients, from wherever in the world their perspective derives.

We are demonstrating the effectiveness of those resources already in Argentina, Brazil, Chile, Colombia, Mexico and Venezuela amongst others, and will continue to consolidate that position through increasingly formal tie ups in those jurisdictions. Our first Latin America seminar at Lloyd's, in 2001 was a public affirmation of our commitment to the development of our business on the Latin American continent and the continued service of our clients' needs there.

This guide continues that process and is perhaps the more necessary in light of the potential impact on global business of Argentina's current economic difficulties and Colombia's recent political unrest.

The Anglo Iberian/Latin American triangle continues to offer a growth market for the insurance and reinsurance industry in what is, despite occasional turbulence, a collection of some of the fastest growing world economies. Protectionism and political and economic volatility will continue to require monitoring, but the twenty-first century is likely to see the continued advance of Latin American economies up the world league.

This guide offers a comparative commentary on a range of key topics likely to be of interest to its readers and includes English and Spanish law summaries for the assistance of Latin American clients and any who wish to check the essential differences from what they might expect in those jurisdictions.

On behalf of my partners and myself, I thank our contributors, Martin Manzano, Jorge Hilário Gouvêa Vieira, Ricardo Sateler, Alejandro Venegas and Francisco Fernández-Guerra Fletes whose details may be found on the inside back cover.

Kenneth McKenzie
May 2002

DISCLAIMER

This guide is for general information only and should not be relied upon for any specific purpose. If you require assistance please contact Kenneth McKenzie or William Allison in London or Pablo Wesolowski or Paulino Fajardo in Madrid. No liability is accepted by Davies Arnold Cooper or any other firm contributing to this guide for its content.

Format

GENERAL LAW

1 What is the source of law in the jurisdiction?

2 How do Courts determine jurisdictional issues?

3 Who has the right to issue Proceedings?

4 What is the typical litigation procedure?

5 What are the limitation periods for issuing Proceedings?

6 Are there any alternatives to litigation?

7 What opportunities are there to settle a claim?

8 Do Courts allow "without prejudice" negotiations to take place?

9 What type of damages may be awarded by the Courts?

INSURANCE ISSUES

10 Claims Made Policies

11 What is the Insured's duty of disclosure?

12 What is the consequence of a breach of a policy condition?

13 What is the consequence of a breach of warranty?

14 Are exclusion clauses in policies effective?

15 The requirement of the Insured to notify Insurers of claims/circumstances

16 What is the effect of a reservation of Insurers' rights?

17 Are third parties entitled to bring direct claims against Insurers under the policy?

18 What are the requirements of a foreign Insurer to carry on business in the jurisdiction?

19 Are the laws for insurance applicable for reinsurance?

Argentina

GENERAL LAW

1 **What is the source of law in the jurisdiction?**

1.1 The key source of law in Argentina is statute. There are, however, other sources of law, including:

- case law;
- custom and usage;
- academic opinion;
- comparative law; and
- general principles of law.

1.2 Generally, Argentine Judges are not obliged to follow court precedents.

1.3 This sometimes leads to uncertainty, with the separate divisions of the Appeal Court reaching different decisions. In these circumstances, a party may request what is known as a *plenario*. In a *plenario,* the different Divisions of the Court of Appeal will act as a single court and will issue a ruling on the principle in dispute. In practice this decision will then be binding upon the Courts of First Instance.

2 **How do Courts determine jurisdictional issues?**

2.1 Argentine Courts have jurisdiction when:

- The Defendant is domiciled in Argentina;
- the place of performance of any of the obligations is located in Argentina; or
- Argentine courts have been chosen by contract as the applicable forum (subject to certain restrictions).

2.2 Argentine courts are vested with exclusive jurisdiction to hear all insolvency proceedings relating to debtors domiciled in Argentina. In respect of debtors domiciled abroad, there is jurisdiction only to the extent that the debtor has assets in Argentina, in which case the insolvency proceedings will be restricted to those assets.

2.3 In general, the courts permit parties to a contract to choose a jurisdiction other than Argentina for the settlement of any disputes arising under a contract, provided that there is a connection with that

jurisdiction and the dispute relates to pecuniary rights. A notable exception to this principle arises in the case of insurance contracts. Pursuant to section 16 of the Insurance Act No. 17,418, parties to an insurance contract may not choose the jurisdiction of foreign courts.

2.4 In respect of insurance cases, Argentine Courts will have jurisdiction if:

- The insurer is domiciled in Argentina;
- the Policyholder is domiciled in Argentina (e.g. in an action for insurance premium recovery);
- the Insurer is a co-insurer and proceedings against the leading Insurer, domiciled in Argentina, are brought in Argentina.

2.5 All Argentine risks can only be insured with Insurers authorised to carry on insurance business in Argentina by the National Superintendency of Insurance. The Insured-Insurer relationship is, therefore, a purely local matter between two parties based in Argentina and subject to Argentine law. Consequently, disputes as to jurisdiction rarely occur.

2.6 The Insurance Act No. 17.418 of 6 September 1967 is the main source of insurance law and sets out the law governing insurance contracts. Regulatory issues are governed by the Insurance Companies Law No. 20.091 of 7 February 1973. Brokers are regulated according to Law No. 22.400 of 18 February 1981.

3 Who has the right to issue proceedings?

3.1 In order for a party to obtain a remedy in the Civil or Commercial Courts, that party must have a corresponding right and a cause of action. For example, in a carriage of goods by sea case the consignee of the cargo has the right to receive the cargo in good condition. If the carrier fails to deliver the cargo in good condition, the consignee will have a cause of action arising from the breach of contract.

3.2 As regards reinsurance contracts, a draft law to modify the current insurance law is before Congress at the time of writing. The draft law addresses several issues relating to reinsurance contracts. In particular, it seeks to introduce a "cut through" clause whereby the Insured has a direct cause of action against the Reinsurer, on the same terms and conditions as the reinsurance contract.

3.3 Unless the parties have agreed otherwise, the draft law establishes that the applicable law and jurisdiction will be that of the country of domicile of the cedant company.

4 What is the typical litigation procedure?

4.1 While in general, substantive laws are adopted by the National Congress and applied in the country as a whole (e.g. the civil, criminal,

commercial, aeronautic and mining codes), each of the 23 provinces of Argentina has the power to enact its own procedural laws. The City of Buenos Aires is a special case, as its procedural law is contained in a federal law, the National Code for Civil and Commercial Procedure (the "Code"). The Code regulates civil and commercial proceedings in federal areas (i.e. those that do not fall within the jurisdiction of a province) including the City of Buenos Aires.

4.2 The Code distinguishes two types of proceedings:

- Fact-finding proceedings seek to examine the evidential basis of a claim and then proceed to judgment.
- Enforcement proceedings seek to enforce a judgment or to make effective a right incorporated into any document which, in the eyes of an Argentine Court, has the same legal effect as a judgment (e.g. a promissory note).

4.3 Civil and commercial proceedings are resolved through a *proceso ordinario* ("ordinary proceedings"), unless they qualify for one of the two abbreviated types of proceedings, *proceso sumario* ("summary proceedings") and *proceso sumarísimo* ("expedited proceedings").

4.4 The Code provides for Summary Proceedings in the following cases:

- Enforcement of a judgment debt;
- complaints related to joint property;
- outstanding obligations for delivery up;
- certain aspects of parental rights and duties, and education;
- fixing payment dates;
- claims for damages in tort;
- breach of carriage contracts;
- the cancellation of a mortgage or pledge; and
- other cases established by law[1].

4.5 Accelerated proceedings are used for redress against acts or omissions which do or will prejudice, restrain, alter or threaten unlawfully any constitutional right or guarantee, provided that the need for the

[1] Article 320 of the Code.

relevant remedy is urgent, and that there are no other appropriate procedures established by the Code or any other law[2].

Ordinary Proceedings

4.6 Ordinary Proceedings consist of three stages: introduction, evidence and judgment. The introductory stage begins with the filing of a complaint with the court and the service of proceedings upon the Defendant.[3]

4.7 The Defendant has 15 days from service of the Complaint to file a Defence and, if appropriate, a Counterclaim. The Defendant also has the option to raise any preliminary objections within ten days of service of the Complaint. Preliminary objections include matters such as: jurisdiction, locus standi and res judicata.

4.8 If the claim involves questions of law only and there are no disputed factual matters, the Court will skip the evidence stage and move directly to judgment. Otherwise, the Court will fix the length of the evidence stage, which, according to the Code, should not exceed 40 days. This optimistic time estimate is seldom adhered to and in practice the evidence stage generally takes approximately two years.

4.9 The evidence stage consists of a hearing at which the judge:

- Invites the parties to settle;
- receives any objections from the parties concerning the evidence proposed;
- lists the factual matters to which the evidence must relate.

4.10 The parties must then produce the relevant evidence. The time period for this stage may be extended if evidence has to be produced outside Argentina.

4.11 The Code identifies and regulates in detail the types of admissible evidence, which include: documents, reports, confessions, witness testimony, expert testimony and judicial inspection.

4.12 In Argentine proceedings, parties are not obliged to disclose all relevant documents. However, pursuant to section 387 of The Code, parties to the action and third parties are obliged to exhibit the documents that are essential for the resolution of the case, or to state where such documents may be located. Pursuant to section 388 of The Code, when a party to the action has been requested by the Judge to exhibit a document, refusal to exhibit the document will result in a presumption against that party.

---

2 Article 321 of the Code.

3 In some cases, ordinary proceeding may start with certain pretrial measures.

4.13 All the evidence must be filed at Court.

Summary Proceedings

4.14 The basic structure of Summary Proceedings is the same as in Ordinary Proceedings, with an introduction, an evidence and a judgment stage. The main differences between Ordinary and Summary Proceedings are that in Summary Proceedings:

4.14.1 The Defendant has less time to file a Defence;

4.14.2 all the evidence must be submitted with the filing of the Complaint (in the case of the Claimant) or the Defence and/or Counterclaim (in the case of the Defendant);

4.14.3 the Defendant's preliminary objections must be filed together with the Defence;

4.14.4 the evidence stage is **not** extended if the evidence has to be produced outside Argentina;

4.14.5 the Court must hand down its judgment within 30 days (instead of 40 days) from the conclusion of the evidence stage.

4.15 As from May 21, 2002 the summary proceedings are eliminated from the Code and Ordinary Proceedings embrace certain provisions of the summary process (e.g. the submitting of the evidence with the Complaint/Defence)

4.16 While similar in structure to Ordinary and Summary Proceedings, accelerated proceedings allow fewer objections and appeals against adverse judgments, as well as providing for shorter deadlines.

Appeals

4.15 Once a First Instance judgment is handed down and notified to the parties, any parties wishing to appeal must apply for leave within five days. Once leave to appeal is granted by the First Instance Judge and the Court of Appeal receives the court file, the parties have ten days in Ordinary Proceedings, and five days in the Summary Proceedings, to make the appeal, after which time the Court of Appeal's judgment is given. A further appeal may be made in certain circumstances to the National Supreme Court of Justice.

5 What are the Limitation Periods for issuing Proceedings?

5.1 In Argentine law, unless specified to the contrary, the basic rule for causes of action founded in **contract** is that proceedings must be commenced within a period of ten years from the date of breach. In respect of causes of action founded in **tort**, the limitation period is two years from date of accrual of the cause of action.

5.2 In **insurance** cases, pursuant to section 58 of the Insurance Act, the limitation period is one year from the date of the cause of action. In life insurance, the limitation period is calculated from the date on which the beneficiary becomes aware of entitlement to the benefit, but in any event within three years from the date of loss.

5.3 The one year limitation period is also applicable to the collection of premiums. If the premium is to be paid in instalments, the limitation period is calculated from the date on which the last instalment is due. If the premium is not paid in instalments, the one year period is calculated from the date the Insurer demands payment.

Reinsurance

5.4 A draft law relating to insurance and reinsurance matters is before Congress at the time of writing. The draft law establishes a time limit of three years for filing actions relating to reinsurance contracts. If passed, the new law will put an end to the unsettled question of the correct limitation period for actions relating to reinsurance contracts, which various sources have claimed is either one year, five years or ten years.

6 Are there any Alternatives to Litigation?

6.1 Parties may use an alternative procedure to litigation as a means of saving time and costs.

6.1.1 Arbitration

Parties may decide to arbitrate their dispute, or a contract to which they are subject may require that the dispute is referred to an Arbitrator.

The arbitrator often has relevant technical expertise and is usually chosen by the parties. The parties are then bound by an arbitrator's decision.

Pursuant to section 57 of the Insurance Act, arbitration clauses are forbidden in insurance contracts. Nevertheless, a post litem arbitration is permissible.

6.1.2 Alternative Dispute Resolution (ADR): Mediation

The Mediation Act No. 24.573 stipulates compulsory pre-trial mediation in the City of Buenos Aires in a number of cases, including insurance matters. Mediation proceedings allow for direct communication between the parties.

The mediation process is not subject to any formality. The aim of the mediator is to identify the issues in dispute and to move the parties towards a settlement. If an agreement is reached, a

written record is drafted incorporating the terms of the agreement, which has the same legal effect as a judgment.

7 **What opportunities are there to settle a claim?**

Parties may negotiate a settlement at any stage of the proceedings and the Judge may invite the parties to settle a case whenever he deems it appropriate. The Judge must also invite the parties to settle the proceedings before opening the evidence stage.

8 **Do Courts allow "without prejudice" negotiations to take place?**

8.1 Under Argentine jurisdiction there is no "without prejudice" rule or similar formula.

8.2 Nevertheless, pursuant to the Mediation Act, mediation proceedings are confidential and, in practice, a confidentiality agreement is executed by the parties.

9 **What type of damages may be awarded by the Courts?**

9.1 The object of an award in damages in Argentine law is primarily to give the Claimant compensation for the damage, loss or injury he has suffered.

9.2 Depending on the type of claim, courts may award further damages such as loss of profits and aggravated damages (*"daño moral"*).

9.3 Currently, punitive damages are not awarded. However, the prospect of punitive damages being awarded in the future has now become a possibility according to a draft law for the enactment of a new civil and commercial code.

10 Claims Made Policies

10.1 There is currently no provision in Argentine law for Claims Made Policies, either approving or prohibiting their use. However:

10.1.1 The Argentine insurance regulatory body, the National Superintendency of Insurance, has recently authorised local insurers to issue Claims Made Policies.

10.1.2 There is a specific provision regulating Claims Made Policies in a draft law currently before congress. This includes a provision forbidding the use of Claims Made Policies in respect of motor insurance.

10.1.3 General academic opinion considers Claims Made Policies to be valid.

11 What is the Insured's duty of disclosure?

11.1 Under Argentine law, contracts must be executed, construed and performed in good faith and according to what the parties truly or reasonably understood or could understand, acting with care and caution (Civil Code, section 1198). In insurance contracts, the duty of good faith is particularly important and is placed on both the Insurer (whose main obligation is to provide a clear and easy-to-read policy and to accept the risks covered under the policy) and the Insured (whose main obligation is to inform the Insurer of the true state of the risk and to pay the premium). It should be noted that if the Insurer provides an application form with a questionnaire, the Insured fully complies with this duty of disclosure by accurately completing the questionnaire at the time of taking out the insurance policy.

11.2 According to section 5 of the Insurance Act No. 17.418 the effect of material non-disclosure and/or misrepresentation by an Insured, which in the opinion of an expert could have induced the Insurer not to take the risk or to modify the terms of the contract if the Insurer had been aware of the real state of the risk, is that the contract is null and void, even if the material non-disclosure and/or misrepresentation was innocent.

11.3 The Insurer must avoid the contract within **three months** of discovering the material non-disclosure and/or misrepresentation.

11.4 If the material non-disclosure and/or misrepresentation was made in good faith and alleged by the Insurer within the three month term, the Insurer may elect to avoid the contract ab initio (returning the premium collected but deducting expenses) or to adjust the premium to reflect

the actual state of the risk (with the agreement of the Insured). In life insurance the adjustment of the premium may be imposed on the Insurer if avoiding the contract is prejudicial to the Insured, provided the contract can be amended in the opinion of an expert and in accordance with the commercial practice of the Insurer (section 6).

11.5 In cases of bad faith or fraud, the Insurer is entitled to retain the premiums.

12 **What is the consequence of a breach of a Policy Condition?**

12.1 Under Argentine law, the concept of a condition precedent does not exist. Instead, the concepts of *"cargas u obligaciones"* are used, which translate as "duties and obligations of the Insured".

12.2 Under an insurance contract the Insured assumes obligations and duties both by law and convention, in addition to the main obligation of paying the premium.

12.3 A breach by the Insured of a legal or conventional duty or obligation may lead to a legal or conventional lapse (*caducidad*) of the rights of the Insured. For example, a typical duty (contemplated by section 46 of the Insurance Act) requires the Insured to give notice of loss within three days from the date the Insured becomes aware of such loss. Pursuant to section 47, the Insured gives up the right to be indemnified if he fails to comply with this duty.

12.4 When a lapse of the Insured's rights is established by law (legal lapse), the loss of the right to be indemnified occurs automatically; in that event, the Insurer need only prove the Insured's breach of duty.

12.5 When there is no legal lapse (i.e. when the law does not establish the effect of a breach of an insured's duty or obligation), the parties may stipulate the lapse (conventional extinguishment) of the rights of the Insured in respect of that particular loss if it arises as a consequence of the Insured's negligence. If the duty of the Insured arises before the occurrence of a loss, the Insurer must invoke the lapse of the Insured's right within **one month** of becoming aware of the breach; if the loss occurs before the Insurer invokes the breach of duty, the Insurer will only be liable if the breach had no influence on the occurrence of the loss or on the extent of the Insurer's financial liability. If the breach of a duty or obligation takes place after the occurrence of a loss, the Insurer is released from its liability if the breach had an influence on the financial value of the Insurer's liability. Therefore, in the event of conventional lapse of the Insured's rights the Insurer must invoke and prove the Insured's negligence and, as the case may be, the influence of the breach on the occurrence of the loss or on the financial value of Insurer's liability.

13 **What is the consequence of a breach of Warranty?**

Under Argentine insurance law there are no warranties.

14 **Are Exclusion clauses in Policies effective?**

Section 11 of the Insurance Act provides that the wording of a Policy must be clear and easy-to-read. Exclusion clauses are effective as long as they comply with section 11.

15 **The requirement of the Insured to notify Insurers of Claims/Circumstances**

15.1 Argentine law requires the Insured to give notice of loss within three days after the loss has come to the Insured's knowledge. The date on which this three-day term starts may vary depending on the type of insurance.

15.2 In liability insurance, despite the fact that the wording of section 115 of the Insurance Act suggests that all circumstances should be reported by the Insured to the insurer, it is commonly construed that the loss occurs only when the third party claims against the Insured. Accordingly the Insured is not required to give notice of circumstances which may give raise to a claim.

15.3 The time limit for giving notice of loss may be extended but not shortened by the insurance policy. E&O, D&O and BBB policies usually contain extended terms, which are valid under Argentine law.

15.4 Late notification entitles an Insurer to repudiate liability for loss.

16 **What is the effect of a reservation of Insurers' rights?**

16.1 There is no concept of "reservation of rights" under Argentine law.

16.2 When an Insurer receives notice of a loss, it must accept or reject the loss within thirty days. If the Insurer is of the view that it needs more information about the loss before it can take a decision, the Insurer must formally request from the Insured the information it needs to reach its decision. This may be done via the loss adjusters. This is referred to as "complementary information".

16.3 This request must be made within thirty days of the loss being reported. The thirty-day term within which the Insurer must decide whether to accept or reject a claim is then postponed until the Insurer has received the relevant information. An Insurer may therefore indirectly "reserve its rights" to reject the claim by requesting complementary information from the Insured.

16.4 In order to postpone the thirty day term for confirming cover, the information requested by the Insurer must be relevant. Furthermore, all questions must be put to the Insured at the same time, or at least within

the 30 day period. If, having requested additional information, the Insurer wishes to raise further questions, it may do so and the 30 day period for confirming cover will again be postponed. However, further questions will only be permitted if they directly relate to the information recently received and could not have been raised earlier.

17 **Are Third Parties entitled to bring direct claims against Insurers under the Policy?**

17.1 Under Argentine Law, third parties cannot claim directly against the Insured's Insurer. However, there is a process (*"citación en garantía"*) whereby a third party litigating against an Insured can require the Insured to bring a claim against its Insurer. Any judgment obtained will then be enforceable against the Insurer up to the limit of the Insurer's liability and subject to the terms and conditions of the Policy.

17.2 With respect to reinsurance contracts, a draft law currently before congress provides that in the case of the insolvency of the cedant company, the reinsurer must pay directly to the liquidator.

18 **What is required of a foreign Insurer to be permitted to carry on business in the Jurisdiction?**

18.1 In order to carry on insurance business in Argentina, a foreign insurer must:

- Have prior authorisation from the National Superintendency of Insurance;
- have assets of a prescribed value established in Argentina;
- specify the lines of insurance it intends to write;
- appoint a local representative.

19 **Are the Laws for insurance applicable for reinsurance?**

19.1 Argentina has no specific statute on reinsurance, although a draft law relating to insurance and reinsurance matters is currently before Congress. The only existing legal provisions specific to reinsurance are four sections of the Insurance Act. These mainly deal with:

- The absence of cut-through rights of the Insured with respect of the Reinsurer;
- the Insured's priority over other creditors as regards the insurance monies owed by Reinsurers to a cedant in liquidation;
- the set-off of credits and debts as between Reinsurer and cedant in the event that either party becomes insolvent.

19.2 Until 1992 the state-owned INdeR monopolised the reinsurance market. The INdeR's position allowed it to impose its solutions when conflicts arose and conflicts with cedants were solved out of court. Given that reinsurance disputes hardly ever reached the courts, there are few decisions to rely on.

19.3 The few reinsurance cases that have been decided by Argentine courts establish that reinsurance is a type of insurance. In the absence of express agreement in the reinsurance contract between the parties and given the absence of legal provisions specific to reinsurance, courts may apply to reinsurance cases, by analogy, the rules established by the Insurance Act for insurance matters.

Brazil

GENERAL LAW

1 **What is the Source of law in the Jurisdiction?**

The law in Brazil is derived from statutory enactments by Congress.

2 **How do Courts determine Jurisdictional issues?**

2.1 Brazilian Courts will have jurisdiction in insurance/reinsurance disputes in the following cases:

2.1.1 When Brazilian jurisdiction is chosen by the insurance/reinsurance Policy;

2.1.2 when the Defendant, regardless of nationality, is domiciled in Brazil provided:

- In relation to the payment of insurance/reinsurance premiums, the Policy holder is domiciled in Brazil;
- in relation to the payment of an indemnity, the Insurer/Reinsurer is domiciled in Brazil; or
- in relation to the recovery of an indemnity paid by the Insurer/Reinsurer, the party responsible for causing the damage is domiciled in Brazil.

2.1.3 If the contractual obligations are fulfilled in Brazil;

2.1.4 if the claim originates from an incident occurring in Brazil;

2.1.5 in claims concerning real property located in Brazil; or

2.1.6 in probate matters, when the assets of the estate are located in Brazil.

2.2 In insurance/reinsurance contracts, where the parties have not expressly chosen the governing law, the legal relationship between the parties will be governed by the law of the country where the contract was created. This is understood, unless otherwise stated in the contract, to be the place where the Insured is domiciled.

2.3 It should be noted, however, that in cases where the insurance contract is between an insurer and a consumer, the Consumer Defence and Protection Code clearly states that any clause which unfairly prejudices the consumer will be null and void. Clauses dealing with jurisdiction or governing law will therefore be subject to this code, and are likely to be

rejected by Judges if they are found to affect the consumer's rights adversely.

3 Who has the right to issue Proceedings?

Parties must have a specific right conferred on them by law in order to initiate proceedings.

4 What is the typical litigation procedure?

4.1 Litigation involving matters of a commercial nature are conducted in accordance with the rules of the Civil and Commercial Codes and the Code of Civil Procedure.

4.2 Proceedings in Brazil are commenced by filing a Writ, which is submitted to a Judge competent to hear the dispute. Once a Writ has been issued, the procedural steps are as follows:

4.2.1 The Defendant has 15 days within which to file the Defence.

4.2.2 Following the Defence, the Claimant must reply rebutting the Defendant's allegations within 5 or 10 days, depending on the allegations upon which the reply is based.

4.2.3 The parties are provided with the opportunity to specify what statements they consider necessary to prove their case.

4.2.4 The Judge will then arrange a conciliation hearing.

4.2.5 If a judicial settlement cannot be achieved, the Judge will proceed at the conciliation hearing to decide any preliminary issues and fix a second hearing to deal with issues of fact.

4.2.6 The Judge will then consider the evidence and hand down a reasoned judgment.

4.2.7 The judgment may be appealed. Any appeal must be lodged within 15 days. There is no way of extending this time period. The respondent has 15 days to respond to the notice of appeal. In certain circumstances, a further appeal is possible to the Higher Court of Justice and ultimately to the Federal Supreme Court. An appeal is only permitted on questions of law, not fact.

5 What are the limitation periods for issuing Proceedings?

5.1 The Civil Code provides a general limitation period for liability claims including subrogation of 20 years. For possessory actions the period is either 10 years for disputes between present parties (those who reside in the same county) or 15 years for disputes between absent parties (those who reside in different counties).

5.2 The Civil Code also provides for specific time limits for certain actions e.g.

Sea and Land Transport Insurance Contract claims	1 year
Insured v Insurer claims	1 year if in Brazil 2 years if outside Brazil
Proprietary rights	5 years

6 Are there any alternatives to litigation?

6.1 Brazilian law provides the following alternatives to litigation:

6.1.1 Arbitration

Arbitration is regulated by federal law and can be used in cases involving disputes over proprietary rights. The parties can choose the procedure to be used and the institution that will conduct the arbitration.

The arbitration award has the same effect as a judgment of the Court. The Court can review an arbitration decision only under very specific circumstances.

A foreign arbitration award will be recognised and enforced in Brazil in accordance with any international treaty with the relevant country, but it first requires ratification by the Brazilian Federal Supreme Court.

6.1.2 Special courts as an alternative method of settling conflicts

There are civil and criminal courts which deal specifically with civil cases of minor complexity and minor criminal misdemeanours, where the parties believe the dispute is capable of settlement.

Proceedings in these courts are characterized by oral evidence, factual simplicity, informality, limited procedural requirements and speed, with conciliation or settlement as their object, whenever possible.

7 What opportunities are there to settle a claim?

Throughout the proceedings the Judge is obliged to offer the parties the opportunity to agree a settlement. Parties can settle a claim at any time up to the handing down of the judgment. Any settlement must be ratified by a Judge.

8 **Do Courts allow "without prejudice" negotiations to take place?**

In Brazil there is no concept of "without prejudice" negotiations. The Judge in a case is free to take into account all evidence in forming his judgment. Therefore, a document marked "without prejudice" is not privileged. Conciliation is, however, a procedural stage.

9 **What type of damages may be awarded by the Courts?**

Damages are awarded as compensation for proven losses (including damages for the interruption of profits). Punitive damages are uncommon, but are being awarded with increasing frequency.

INSURANCE ISSUES

10 Claims Made Policies

Claims Made Policies are recognised in Brazil, but they can only provide retroactive cover to the extent that the Insured is not aware of potential claims at the time of obtaining cover.

11 What is the Insured's duty of disclosure?

Brazilian insurance law is governed by the concept of good faith. An Insured who fails to observe good faith in his declarations to Insurers forfeits his right to cover and remains liable for the premium.

12 What is the consequence of a breach of a policy condition?

A breach of a Policy Condition may release the Insurer from liability for the claim.

13 What is the consequence of a breach of warranty?

A breach of Warranty entitles the Insurer to avoid the Policy and to retain the premium in cases of bad faith.

14 Are exclusion clauses in policies effective?

14.1 Clauses limiting or excluding liability are permitted, provided they limit or exclude private contractual rights and are not precluded by law.

14.2 Insurance contracts cannot provide for unilateral termination of a contract, or restrict the effectiveness and validity of the contract, other than as provided by law.

14.3 Against a consumer, exclusion clauses are governed by the strict requirements of the Consumer Protection Code. Any clause deemed to place the consumer at a marked disadvantage will be null and void.

15 The requirement of the Insured to notify Insurers of claims/circumstances

The Insured must notify Insurers as soon as he becomes aware of circumstances giving rise to a claim. Failure to do so, without good reason, entitles Insurers to avoid liability to the extent they can show that the delay has caused prejudice.

16 What is the effect of a reservation of Insurers' rights?

Brazilian law provides as a general principle that recipients of monies not due to them are obliged to return them. Pursuant to this principle, the Insurer may reserve his rights prior to confirming cover and recover any payment made to/or on behalf of the Insured if it subsequently becomes evident that the Insured was not entitled to payment. Such recovery actions are, however, subject to limitation.

17 **Are third parties entitled to bring claims against Insurers under the policy?**

Third parties have no direct right of action against Insurers in Brazil.

18 **What are the requirements of a foreign Insurer to carry on business in the jurisdiction?**

18.1 Foreign insurance companies are only permitted to operate in Brazil through a branch or a subsidiary incorporated in the country and duly authorized by the competent authorities. However, there is no restriction on investment of foreign capital in insurance companies.

18.2 A foreign company intending to operate in Brazil as a branch requires authorisation from the federal government. The procedure is extremely slow and bureaucratic. Once authorised, it will be subject to the Brazilian laws as regards acts and operations performed in Brazil.

18.3 The majority of companies prefer to create a subsidiary, as the procedure is quicker, cheaper and less bureaucratic. A new legal entity (as opposed to an office), having its principal place of business in Brazil, enjoys the status of a Brazilian company, although under the control of foreign capital.

18.4 Once the company has been constituted in accordance with Brazilian law, it must apply to the competent authorities for authorisation to operate as an insurance company; these are SUSEP (the Brazilian Insurance Commission) and CNSP (the National Council of Private Insurance).

18.5 After authorisation has been granted by the Minister of State for Finance, the company has 90 days to satisfy SUSEP that it is compliant with all the requirements of the governing laws.

19 **Are the laws for insurance applicable for reinsurance?**

In general the laws relating to insurance contracts are applied to reinsurance contracts.

Chile

GENERAL LAW

1 **What is the source of law in the jurisdiction?**

In Chile the main source of law governing insurance matters is Parliamentary statute. As far as insurance contracts are concerned, the applicable law is the Commercial Code. The regulatory authority which monitors insurance companies is the Superintendency of Insurance.

2 **How do Courts determine jurisdictional issues?**

2.1 Jurisdiction in Chile is determined by private international law. These rules are complex and follow the conventions prevailing in the Americas.

2.2 All questions arising out of insurance and reinsurance contracts are subject to Chilean law and must be submitted to Chilean jurisdiction (Article 29 of the Law of Insurance Companies). Notwithstanding this provision, it is not unusual in major insurance contracts for the application of foreign law to be agreed between the parties. For example, many contracts provide for a specific foreign jurisdiction to apply in the event of a dispute, although it should be noted that there is no court decision confirming that such clauses will be deemed effective.

3 **Who has the right to issue proceedings?**

3.1 As a general rule, only the parties to a contract have the right to initiate proceedings related to the interpretation, application and validity of the contract, and this holds true with regard to insurance contracts. Third parties in Chile have no right to initiate proceedings against the liability Insurer.

3.2 However, any person can initiate criminal proceedings. The only exceptions to this principle occur in cases such as libel and slander, which are deemed matters of "private interest".

3.3 A civil action claiming damages arising from a criminal offence might be initiated in the course of criminal proceedings. Such actions are, as a general rule, based on tort and not on contract.

4 **What is the typical litigation procedure?**

4.1 Civil litigation in Chile is governed by the Civil Procedure Code and is of an adversarial nature. Judges do not have a pro-active role and the

parties have the burden of setting out the legal arguments and establishing the facts.

4.2 Proceedings are initiated by the filing of a Complaint which must contain a statement of claim including the factual and legal arguments in support of the case. The Complaint must be served upon the Defendant who has 15 days from the date of service to file a Defence. The Claimant has the right to file a rejoinder and the Defendant a further rejoinder. This exchange of written documents is known as the "discussion stage".

4.3 After close of written submissions, the parties have to produce evidence in support of their case. The most important forms of evidence are documents, witness testimony, expert opinion, inspection *in situ* by the tribunal and confession. The law governing the production of evidence is contained in the Civil Procedure Code.

4.4 The tribunal may order disclosure of documents at the request of any of the parties. The order normally refers to specific documents or clauses in documents. In Chilean law there is no general obligation on the parties to disclose all relevant documents and parties need only produce evidence which supports their case. The tribunal is entitled to order the disclosure of a document only if requested to do so by the parties and the document has a direct relevance to the case.

4.5 Once evidence has been produced, the tribunal proceeds to issue its judgment. There are no jury trials in civil matters.

4.6 Appeal from a decision at first instance is to the Court of Appeal. A further appeal may be made under certain circumstances to the Supreme Court. A review of the decision of the Court of Appeal may be requested, on exceptional grounds, from the Supreme Court.

4.7 As a general rule, the parties are not entitled to extend time limits but they have the right to agree to suspend proceedings for a limited period. This right may only be exercised twice during the proceedings.

5 What are the limitation periods for issuing Proceedings?

5.1 In Chilean law, the basic rule for actions founded in contract is that the proceedings must be commenced within a period of 5 years from the date of breach.

5.2 For actions founded in tort the limitation period is 4 years from the date of occurrence of the damage. There are however a number of specific exceptions depending on the type of remedy sought.

6 Are there any alternatives to litigation?

6.1 There are no compulsory alternatives to litigation, except in certain specific cases where compulsory arbitration is provided for. If the parties agree, any civil or commercial issue may be submitted to arbitration.

6.1.1 Arbitration

The parties may decide to arbitrate their dispute (to avoid the delay and expense of litigation) or a contract to which they are party may require that the dispute be referred to an Arbitrator.

Arbitration enables the parties not only to decide the procedure the arbitrator will follow but also the applicable law. The arbitrator often has relevant technical expertise and is usually chosen by the parties. He has the power to impose solutions, which legally bind the parties and are often more practical than those of the court.

It should be noted that most disputes of a commercial nature are referred to arbitration. As a general rule, all commercial contracts contain an arbitration clause. Eventually all insurance policies issued in Chile will contain an arbitration clause.

The most important arbitration institution in Chile is the Santiago Chamber of Commerce. Recently, a new institution has been established under the auspices of the American Chamber of Commerce. The latter has been set up in cooperation with the American Association of Arbitration and its rules closely follow the AAA international rules.

6.1.2 Alternative Dispute Resolution (ADR)

Mediation and other forms of ADR are rarely employed, so far.

7 What opportunities are there to settle a claim?

7.1 The Chilean civil procedure is rather formal and it is not geared so much to facilitating a settlement, as to a judicial decision. There is a procedural step in litigation which requires the parties to attend a conciliation meeting but this step has become a formality and is rarely taken as a meaningful opportunity for achieving settlement.

7.2 Outside formal judicial procedure, the parties are free to enter into discussions and, if possible, reach an out-of-court settlement. That settlement is usually transmitted to the tribunal with a view to closing the proceedings. The out-of-court settlement in such cases has a similar effect to a judgment.

8 **Do Courts allow "without prejudice" negotiations to take place?**

The concept of "without prejudice" negotiation used in English legal procedure does not have the same meaning in Chile. Every written document may be used as evidence and a document cannot be considered as inadmissible simply because it carries the words "without prejudice".

9 **What type of damages may be awarded by the Courts?**

9.1 The object of an award in damages in Chilean law, is primarily to compensate the Claimant for the damage, loss or injury he has suffered and not to penalize transgressors.

9.2 Unlike certain common law legal systems (for example the USA) the Chilean legal system does not recognize the concept of exemplary or punitive damages.

9.3 However, while statutory provisions are clear on this point, case law sometimes departs from the letter of the law and there have been a number of cases where tribunals have awarded what are, to all intents and purposes, exemplary damages. That is often the case where there is gross negligence on the part of a large corporation and the damage is suffered by a weaker party (for example, in labour accidents regarding health and safety at work or environmental damage).

INSURANCE ISSUES

10 Claims Made Policies

Claims made policies are recognised in Chile. For example, the standard texts of the medical liability and product liability policies approved by the Superintendent of Insurance are claims made policies.

11 What is the Insured's duty of disclosure?

11.1 The duty of utmost good faith is a fundamental principle of Chilean insurance law and places on the Insured the obligation to declare honestly all the information necessary to enable the insurer to identify and assess the scope of the risk. The insurance contract is deemed null and void if the Insured does not reveal circumstances which, had they been made known to the Insurer, would have led the latter not to take the risk or to take it on substantially different conditions.

11.2 Failure by the Insured to disclose all material facts or material misrepresentation entitles the Insurer to elect to avoid the Policy *ab initio*.

12 What is the consequence of a breach of a policy condition?

12.1 In accordance with the Chilean Commercial Code, the insurance contract is to be considered terminated *ab initio* in cases of breach of any statutory or contractual obligation. However, it is deemed to be valid and enforceable until a Judge declares it to be null and void. The Chilean Civil Code establishes that a contracting party cannot be forced to give effect to a contract if the other party has not fulfilled, or is not able to fulfill, his own obligations under the contract.

12.2 In Chile, insurance policies do not provide for conditions precedent to the liability of the Insurer. Accordingly, there is no case law as to the effect of a breach of a condition expressed to be precedent to liability. Most probably it will not automatically entitle the Insurer to avoid the Policy but the Insured may be precluded from recovery in respect of that loss. It is not clear whether tribunals will construe a condition precedent to liability as a condition entitling the Insurer to refuse the claim, regardless of whether prejudice to the Insurer has been caused.

13 What is the consequence of a breach of warranty?

The consequence of a breach of warranty is that the contract is not enforceable against the Insurer. However, if a breach of warranty does not prejudice the Insurer, it is likely that a tribunal would find that the contract is still enforceable against the Insurer.

14 **Are exclusion clauses in policies effective?**

14.1 As a general rule, exclusion clauses in policies are enforceable and can effectively exclude or limit the liability of the Insurer.

14.2 Exclusion clauses must be clear and unambiguous. In accordance with the Civil Code, ambiguous and unclear provisions in a contract are construed against the party which drafted them.

14.3 Consumer protection law in Chile is new. Congress passed enacted legislation in 1999; although this has yet to be tested by the Courts, it does not apply in principle to insurance contracts.

15 **The requirement of the Insured to notify Insurers of claims/circumstances**

The Chilean Commercial Code provides for almost immediate notice of loss from the Insured to the Insurer. The recent trend in case law however has been to require detriment to the Insurer before a contract is declared non-enforceable because of late notification.

16 **What is the effect of a reservation of Insurers' rights?**

Insurers may reserve their rights while considering whether a claim is covered by the Policy. That reservation cannot extend to an unreasonably long period of time. What is deemed "unreasonable" will depend on the circumstances of each case.

17 **Are third parties entitled to bring claims against Insurers under the policy?**

17.1 Chilean law does not provide for the right of a third party to bring a claim direct against an Insurer.

17.2 Exceptionally, third parties having claims against a debtor/Insured may exercise rights directly against the Insurer by means of interim and precautionary measures aimed at ensuring that the payments under a Policy benefit the creditors of the debtor/Insured.

18 **What are the requirements of a foreign Insurer to carry on business in the jurisdiction?**

18.1 No company may carry on any insurance business in Chile unless it is:

- a public corporation (*"Sociedad Anónima"*) incorporated in Chile;
- exclusively dedicated to insurance;
- specifically authorised by the Superintendent of Insurance to conduct insurance business.

18.2 In order to obtain such authorization, the prospective Insurer has to meet a number of requirements in terms of assets, solvency, structure and due establishment of boards of directors and administration.

18.3 It is a crime under Chilean law to engage in insurance activities without the proper authorisation.

18.4 It is legally possible to insure Chilean property with a foreign Insurer, but the transaction is subject to prohibitive taxes. In circumstances involving particularly large risks, Chilean Insurance companies issue "fronting policies" fully reinsured abroad.

19 **Are the laws for insurance applicable for reinsurance?**

The laws for insurance apply to reinsurance, save in certain cases where consumers may be affected.

Colombia

GENERAL LAW

1 What is the source of law in the jurisdiction?

In Colombia, the main source of law is statute. Case law precedent provides an auxiliary source of law.

2 **How do Courts determine jurisdictional issues?**

The rules governing jurisdiction are embodied in domestic legislation and in the international conventions ratified by Colombia. As a general principle, in insurance matters, jurisdiction is determined by reference to the place where the contract is performed and the domicile of the Defendant.

3 **Who has the right to issue proceedings?**

Parties to contracts and parties suffering damage are entitled to bring an action. Third parties can, however, bring actions against Insurers.

4 **What is the typical litigation procedure?**

4.1 Civil procedural is governed by the Civil Procedure Code.

4.2 In general terms the litigation procedure is as follows:

4.2.1 All litigation begins with a Complaint or Petition which must comply with certain basic formalities. (Article 75 of Civil Procedure Code).

4.2.2 Once the Petition has been issued, the Court notifies the Defendant who must file an "Answer" within the period required by the Law for the particular proceedings e.g. 20 days in ordinary proceedings, 10 days in summary proceedings. The Answer must deny or admit the claims made.

4.2.3 The next stage is review of evidence; all evidence must be submitted with the Complaint, Petition or Answer.

4.2.4 Once the evidence stage is completed, the parties are allowed to submit their final arguments in writing. Parties may submit questions to the other side relating to the submissions made, provided they do not exceed 20 in number and are approved by the Judge.

4.2.5 The Court will then consider the case on paper and issue a written judgment. This judgment can normally be appealed.